Office-Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-194

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Chappell v. *Wallace*, 462 U.S. 296 5

Feres v. *United States*, 340 U.S. 135 ..... 4, 5, 6

Flood v. *Kuhn*, 407 U.S. 258 3

Hinkie v. *United States*, 715 F.2d 96, cert. denied, No. 83-809 (Feb. 21, 1984) 6

Laswell v. *Brown*, 683 F.2d 261, cert. denied, 459 U.S. 1210 6

Lombard v. *United States*, 690 F.2d 215, cert. denied, 462 U.S. 1118 6

Monaco v. *United States*, 661 F.2d 129, cert. denied, 456 U.S. 989 6

Mondelli v. *United States*, 711 F.2d 567, cert. denied, No. 83-632 (Feb. 21, 1984) 6

Panella v. *United States*, 216 F.2d 622 ..... 1, 2

Scales v. *United States*, 685 F.2d 970, cert. denied, 460 U.S. 1082 6

Sheehan v. *United States*, 713 F.2d 1097, cert. denied, No. 83-6233 (May 14, 1984) 6

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 4, 5, 6

United States v. *Brown*, 348 U.S. 110 3

Page

Cases—Continued:

United States v. *Muniz*, 374 U.S. 150 3

West v. *United States*, 729 F.2d 1120 vacated, 744 F.2d 1317, petition for cert. pending, No. 84-1083 5

Statute:

Pub. L. No. 98-525, § 1631, 98 Stat. 2646 3

Miscellaneous:

H.R. 1942, 98th Cong., 1st Sess. (1983) 4

H.R. Rep. 98-124, 98th Cong., 1st Sess. (1983) 4

Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 3

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-194

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent's argument that her claim is not barred by the intentional tort exception consists principally of reiterating that her claim alleges negligence by government employees (see Resp. Br. 10-11) — specifically, by the military superiors of Heard and Shearer — and of citing (Resp. Br. 15-20) several cases that follow *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), in ruling that the government can be held liable under the FTCA for injuries inflicted by the intentional tort of a non-employee who is under the government's supervision. As we explained in our opening brief (at 9-10), respondent cannot avoid the intentional tort exception merely by framing a claim that sounds in negligence; the intentional tort exception does not simply bar claims *for* assault and battery but rather precludes all claims "arising out of" assault or battery. Unless this choice of words is to be accorded no significance, respondent's

claim must be barred. We also explained in our opening brief (at 22-24) why the *Panella* line of cases does not aid respondent.

2. In her unsuccessful attempt to avoid the intentional tort exception, respondent repeatedly emphasizes that her "claim is not based on Heard's * * * murder of Shearer, but is premised on the military's negligent acts" of failing to discharge Heard, to "control" Heard, or to warn other servicemen about Heard. Resp. Br. 10; see, *e.g., id.* at 6-7, 10-11, 21; *id.* at 12 ("[R]espondent's cause of action does not arise out of Heard's killing of Shearer, but from the military's negligent failure to rid itself of or to warn of the menace Heard posed to other service members."). But when respondent attempts to explain why her claim is not barred by *Feres,* she shifts ground and treats her claim as if it *were* "based on Heard's murder of Shearer"; she emphasizes Shearer's location, duty status, and activity at the time he was killed by Heard. See Resp. Br. 28-31.

As we explained in our opening brief (at 30-31), these factors are irrelevant, because we do not assert, and need not assert, that Heard's tort was incident to Shearer's military service; Heard was unquestionably acting outside the scope of his employment when he killed Shearer, and respondent accordingly does not even attempt to hold the government directly liable for Heard's action. The only torts alleged in respondent's complaint that were even arguably committed by government employees acting within the scope of their employment were the decisions made by Shearer's and Heard's superiors with respect to the discharge, control, and discipline of Heard. These government decisions were not made while Shearer was off duty or off the base; they were decisions made by military officials in the exercise of their responsibility to manage the composition of their forces and relationships among servicemen,

including Shearer. These decisions were, therefore, clearly incident to Shearer's military service.

Respondent makes unmistakably clear in her brief (*e.g.,* at 10) that her claim is that Shearer's military superiors breached a duty they owe to servicemen to exercise due care in protecting them — by warnings and the appropriate use of discipline — against other servicemen who may be prone to acts of violence. This duty and the extent to which it is faithfully discharged in any particular instance are obviously integral aspects of "the 'peculiar and special relationship of the soldier to his superiors' " (*United States* v. *Muniz,* 374 U.S, 150, 162 (1963), quoting *United States* v. *Brown,* 348 U.S. 110, 112 (1954)). The purpose of the *Feres* doctrine is precisely to prevent courts from inquiring into, and attempting to supervise, that relationship in the guise of adjudicating tort claims.[1]

---

[1]Although respondent asserts (Br. 24 n.6) that the *Feres* doctrine has been widely criticized by commentators, she does not note the evidence — some of which is mentioned in our opening brief (at 26 n.7) — that Congress is aware of the 35-year old *Feres* doctrine and has deliberately chosen not to overrule it. See *Flood* v. *Kuhn,* 407 U.S. 258, 283-284 (1972). For example, Congress in its most recent session enacted Section 1631 of Pub. L. No. 98-525, 98 Stat. 2646, which provides that an individual injured "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States" can bring suit against the government under the FTCA. The language that became Section 1631 was proposed by a representative of the Department of Justice, who advised the subcommittee considering the proposed legislation that it would incorporate the *Feres* doctrine and answered questions from subcommittee members about that aspect of the proposed legislation. *Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 20-38 (1983) (testimony of Deputy Assistant Attorney General B. Wayne Vance). In addition, a congressional committee recommended against the adoption of another version of this legislation partly on the ground

Respondent further suggests that *Feres* does not bar her claim because she is challenging not the formulation of military policy but its application in particular circumstances. See Resp. Br. 7-8, 33-34 n.11.[2] But both decisions in which this Court ruled that the *Feres* doctrine barred a suit under the Federal Tort Claims Act — *Feres* itself and *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977) —involved actions by the military that cannot be characterized as the formulation of military policy. The military actions involved in *Feres* and the cases decided with it were medical malpractice and the "quartering [of a serviceman] in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch" (340 U.S. at 137); in *Stencel Aero* the allegation was that the government provided "faulty specifications, requirements, and components" to the manufacturer of military equipment

---

that it "may be grossly unfair to both current and potential plaintiffs" because, among other things, it would incorporate "the doctine established in *Feres* v. *United States,* 340 U.S. 135 (1950) * * * prohibit[ing] suits by veterans for torts arising while they were on active duty." H.R. Rep. 98-124, 98th Cong., 1st Sess. 4-5 (1983). Thus, Congress was clearly aware that the *Feres* doctrine is a limit on the FTCA remedy, but it chose to extend that remedy to a new category of cases nonetheless.

In addition, Congress recently refused to enact a bill that would have to amended the FTCA to abolish the *Feres* defense with respect to claims "aris[ing] out of medical or dental care furnished * * * in a Department of Defense hospital." H.R. 1942, 98th Cong., 1st Sess. (1983).

[2]Respondent's statement of this position is not always internally consistent; for example, respondent asserts that she "seeks not to second-guess the decisions of superior officers, but merely [to] review * * * [the] failure to remove Heard from the Service" (Resp. Br. 7-8) — a decision made by superior officers. See also Resp. Br. 34 n.11 ("Respondent does not challenge * * * the specific way in which a serviceman's superior officers have discharged their responsibilities to him * * * but [does challenge] the specific failure to remove Andrew Heard from active duty".).

that malfunctioned and injured a serviceman (431 U.S. at 668). Moreover, it is apparent that there are many instances in which *Feres* should preclude claims that involve a challenge not to the formulation of military policy but to its implementation; for example, if a serviceman sued under the FTCA claiming that a routine training exercise was carried out in an excessively rigorous or hazardous fashion by his drill sergeant, his claim would unquestionably be barred by *Feres.* See generally *Chappell* v. *Wallace,* 462 U.S. 296 (1983).[3]

Finally, respondent suggests (Resp. Br. 36) that her claim should not be barred because Shearer had not enlisted at the time some of the alleged negligent acts occurred. But if a serviceman alleges an injury that arises out of or is incident to military service, his claim is barred by *Feres* irrespective of whether he enlisted before or after the government actions that initiated the causal chain leading to his injury. See U.S. Br. 31 nn.11, 12 (citing cases). In *Stencel Aero,* for example, the Court did not inquire into whether the government's alleged negligence occurred before or after the injured serviceman enlisted, even though it might well have occurred prior to enlistment. The damage that the *Feres* doctrine is intended to prevent is equally threatened whether or not the injured serviceman has actually enlisted at the time of the alleged negligent act: an officer's willingness to act decisively will be affected — and the "peculiar and special relationship of the soldier to his superiors" will therefore be disrupted — whenever the officer has grounds for concern that a serviceman who will be affected by his

---

[3]Respondent relies heavily on the panel decision in *West* v. *Urited States,* 729 F.2d 1120 (7th Cir. 1984), which reversed the district court decision in that case. See Resp. Br. 33-36. But the panel decision was vacated by the en banc court of appeals, which then affirmed the district court by an equally divided vote. 744 F.2d 1317 (1984), petition for cert. pending, No. 84-1083 (filed Dec. 31, 1983).

action will be able to bring suit; it will not matter to the officer whether the potential serviceman has enlisted at the time of the action or enlists subsequently and is affected by the officer's decision at that time. In addition, the *Feres* doctrine is designed to avoid "litigation * * * [in which the] issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety" and "trial[s that] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel Aero Engineering Corp.*, 431 U.S. at 673). Such litigation will occur whenever suit is brought on behalf of a serviceman for injuries sustained incident to military service; it is immaterial whether the serviceman enlisted before or after the military decision that is under review.[4]

---

[4]Respondent also appears to suggest (Br. 26) that her suit should be allowed even though it is brought on behalf of a serviceman, because respondent herself is not enlisted in the Armed Forces. As we noted in our opening brief (at 26 n.8), this argument is foreclosed by *Feres* itself. It is also inconsistent with *Stencel Aero Engineering Corp.*, 431 U.S. at 673: "[I]t seems quite clear that where the case concerns the injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." The lower courts have also consistently rejected the contention respondent now makes. See, *e.g.*, *Hinkie* v. *United States*, 715 F.2d 96 (3d Cir. 1983), cert. denied, No. 83-809 (Feb. 21, 1984); *Sheehan* v. *United States*, 713 F.2d 1097 (5th Cir. 1983), cert. denied, No. 83-6233 (May 14, 1984); *Mondelli* v. *United States*, 711 F.2d 567 (3d Cir. 1983), cert. denied, No. 83-632 (Feb. 21, 1984); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983)); *Laswell* v. *Brown*, 683 F.2d 261 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir 1981), cert. denied, 456 U.S. 989 (1982). See also Pet. App. 25a n.1 (citing cases).

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1985